No. 16-1362

In the
# Supreme Court of the United States

ENCINO MOTORCARS, LLC,

*Petitioner*,

v.

HECTOR NAVARRO, MIKE SHIRINIAN, ANTHONY PINKINS, KEVIN MALONE, REUBEN CASTRO,

*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY BRIEF FOR PETITIONER


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## REPLY BRIEF

The Fair Labor Standards Act (FLSA) exempts from its overtime-pay requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." 29 U.S.C. §213(b)(10)(A). Service advisors are clearly salesmen: they "interact with customers and sell them services for their vehicles." *Encino Motorcars, LLC v. Navarro* (*Encino I*), 136 S. Ct. 2117, 2121 (2016). Service advisors are also primarily engaged in servicing: they spend their workdays "sell[ing] services," "recording service orders," and "explaining the repair and maintenance work." *Id.* at 2122. Because service advisors are "salesm[e]n" primarily engaged in "servicing automobiles," they are exempt. Even the Ninth Circuit conceded that §213(b)(10)(A)'s literal, disjunctive terms encompass service advisors.

Respondents jump through hoops in an attempt to evade the statute's literal terms. For example, Respondents invoke the *expressio unius* canon based on their repeated and question-begging assertion that §213(b)(10)(A) includes "three and only three" occupations. But that argument is premised on an agency "handbook" that Congress never considered and this Court has never cited. In reality, the statute does not exempt just three itemized occupations, but includes broader language that exempts salespeople primarily engaged in selling *or* servicing automobiles, which plainly encompasses service advisors. Respondents resist that conclusion by denying that service advisors are "salesmen." But that novel claim conflicts with *Encino I* and the allegations of Respondents' own complaint.

Respondents undertake elaborate efforts to define "servicing" narrowly. Not only do those definitions lack grounding in the statutory text; they would carve partsmen right out of the exemption, despite Congress' undeniable intent to exempt partsmen. While Respondents belatedly try to accommodate partsmen (on page 41 of a 50-page brief), all but the least-plausible and most-gerrymandered of their late-breaking expansions of "servicing" would exempt service advisors as well. In reality, Congress defined servicing broadly enough to capture partsmen *and* service advisors, both of whom are primarily engaged in servicing without spending their days under the hood.

Respondents dust off an antiquated interpretive canon and invoke a laundry list of inapposite statutes to resist this plain-language and common-sense interpretation, but none of that changes the reality that there are approximately 100,000 service advisors engaged in servicing automobiles who fall comfortably within the exemption's plain terms. Respondents downplay "decades of industry reliance," *Encino I*, 136 S. Ct. at 2126, by invoking inadequate substitutes for §213(b)(10)(A)'s readily-administered exemption and implausibly contending that reversing the Ninth Circuit's alone-in-the-Nation decision would cause disruption. In reality, reversal would avoid disruption by reaffirming the *status quo ante* that has governed for nearly fifty years and by ensuring comparable treatment of all three key members of the servicing triad, rather than giving the highest paid of the three an unjustified windfall.

## I. Section 213(b)(10)(A) Unambiguously Exempts Service Advisors.

### A. Service Advisors Are "Salesmen."

Respondents start their lead *expressio unius* argument on the same wrong foot on which the Ninth Circuit began its opinion: they invoke the Occupational Outlook Handbook ("OOH") to claim that "Congress chose to exempt three and only three specific occupations" in §213(b)(10)(A), and service advisor is not one of them. Resp.Br.8. Remarkably, given the OOH's centrality to their lead argument, Respondents offer no answer to the myriad problems with OOH reliance detailed in Petitioner's brief. *See* Pet.Br.36-37. Never mind that there is absolutely no evidence in the legislative history or elsewhere that Congress considered the OOH in enacting or amending §213(b)(10)(A), or that no member of this Court has ever cited the OOH, let alone relied on it in interpreting the FLSA. *Id.* Respondents' silence is striking and confirms that Congress did not merely "itemize" three "specific occupations" listed in the OOH. Resp.Br.13.[1]

Instead, Congress broadly exempted "*any* salesman, partsman, or mechanic primarily engaged in selling *or* servicing automobiles." §213(b)(10)(A) (emphases added). Broadening terms like *any* and *or*

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[1] The 1966 OOH lists "automobile body repairmen" as a separate occupation, Pet.App.9, yet DOL has from the beginning treated body repairmen as exempt. *See* DOL Wage and Hour and Public Contracts Division, Opinion Letter (Mar. 7, 1968). That confirms there is simply no three-to-three correspondence between OOH job titles and occupations exempted by the broader text of §213(b)(10)(A).

confirm that §213(b)(10)(A) exempts salespeople beyond those who sell automobiles and that efforts to limit the exemption to salespeople selling automobiles are "flatly contrary to the statutory text." *Walton v. Greenbrier Ford, Inc.*, 370 F.3d 446, 451 (4th Cir. 2004) (Gregory, J.).[2]

Respondents are forced to resort to the extreme claim that service advisors, a.k.a., "service salesmen," 29 C.F.R. §779.372(c)(4) (1971), are not "salesmen." Resp.Br.14-15. Even the Ninth Circuit did not go that far. *See* Pet.App.38 (conceding "a service advisor qualifies ... as a 'salesman'"). And with good reason, as Respondents' novel argument disregards both *Encino I* and Respondents' own complaint.[3]

This Court observed in *Encino I* that service advisors "interact with customers and sell them services for their vehicles," 136 S. Ct. at 2121, noted that "a service advisor sells repair and maintenance services," *id.* at 2122, and referred to "dealership employees who sell services (that is, service advisors)," *id.* at 2127. Those statements were not mere

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[2] Respondents deny that "any" is a term of breadth. Resp.Br.18. But this Court has repeatedly held the opposite, including in the FLSA context, *e.g.*, *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 162 (2012), and Respondents' own authority recognized "any" as a "broad term[]," albeit one that did not modify the critical word at issue there, *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 93 (2006). While context may sometimes qualify the term's inherent breadth, Respondents identify no such "context" here.

[3] Respondents' "not-even-a-salesman" argument was not raised at any previous point in these proceedings, including *Encino I*. *See OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397-98 (2015) ("[W]e will not entertain arguments not made below.").

commentary: the Court faulted DOL's 2011 regulation for failing, *inter alia*, to adequately explain its distinction between "dealership employees who sell vehicles" and "dealership employees who sell services (that is, service advisors)." *Id.*

Respondents acknowledge this, but implausibly suggest that selling is incidental to "the fundamental job of a service advisor," which, they claim, "is to advise and to transmit information, not to sell." Resp.Br.14. That argument ignores both reality and Respondents' own complaint. An effective service advisor, like an effective automobile salesperson, no doubt excels at advising customers and communicating with them. But if Respondents spent their whole day advising customers without selling them servicing, they would earn nothing.

In reality, as the complaint underscores, Respondents' principal activities and the entire basis for their compensation involve "solicit[ing] and suggest[ing]"—*i.e.*, selling—servicing. JA55-56. They "solicit and suggest[] ... that service be conducted on the vehicle to remedy the complaints of the vehicle owner." JA55. They then "solicit and suggest ... supplemental service ... above and beyond ... the initial complaints." JA55. Indeed, they "solicit and suggest to the vehicle owner, as many repairs to the vehicle as possible." JA56. If someone who is employed to "solicit and suggest" servicing, and whose success at solicitation dictates their compensation, is not a "salesman," it is hard to imagine who is.[4]

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[4] Of course, service advisors are salespeople whether selling the initially-requested service or "up-selling" additional services. Thus, Respondents' effort to liken service advisors to workers

### B. Service Advisors Are Primarily Engaged in Servicing Automobiles.

Service advisors are not just salesmen, but are "primarily engaged in ... servicing automobiles." As this Court recognized in *Encino I*, service advisors, along with partsmen and mechanics, are "[a]mong the employees involved in providing repair and maintenance services." 136 S. Ct. at 2121. Specifically, service advisors are the salesmen dedicated to the dealership's service side, which typically generates more profit than vehicle sales. *See* Pet.Br.28. Indeed, "[n]o position is more crucial to the vehicle service function than the Service Advisor." NADA.Br.7.

The Ninth Circuit resisted the straightforward conclusion that service advisors are "primarily engaged in ... servicing automobiles" by injecting the words "actually" or "personally" into §213(b)(10)(A) to modify "servicing." Pet.Br.39. Respondents stop short of affirmatively embracing that maneuver, suggesting that the Ninth Circuit used "personally" only once, and that "actually" is "implicit" in the statute. Resp.Br.28. But Respondents' own efforts to narrow the scope of servicing are every bit as atextual and

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engaged in "incidental" sales, like a flight attendant who sells passengers food or a dental hygienist who suggests a tooth-whitening procedure, is inapt. Flight attendants, as they will remind you, are primarily there for passengers' safety, not for food sales. Similarly, a dental hygienist primarily cleans teeth. By contrast, whether selling or up-selling, the primary job of service advisors (and often the entire basis for their compensation) is selling services.

problematic, especially given Congress' conceded intent to exempt partsmen.

Respondents offer a variety of narrow definitions for "servicing," including (1) "automotive manual labor, quintessentially maintenance or repairs," (2) "maintain[ing] or repair[ing] automobiles," and (3) "perform[ing] ... mechanical operations on [an automobile]." Resp.Br.19-21. But not one has any grounding in §213(b)(10)(A)'s text. To the contrary, these definitions, derived from inapposite statutes, simply underscore that Congress knows how to give servicing a narrow compass, *see, e.g.*, 2 U.S.C. §2025(b) (defining "servicing" as "the washing and fueling of [a] vehicle, the checking of its tires and battery, and checking and adding oil"), and did not do so in §213(b)(10)(A).

More important, even assuming servicing involves maintaining and repairing automobiles, the question remains whether an employee must maintain or repair the vehicles "personally"—or, to use Respondents' new term, "manually." And it is clear that Congress did not intend such a requirement, because it not only omitted such adverbs from §213(b)(10)(A), but also exempted partsmen, who do not themselves actually, personally, or manually perform "maintenance or repairs" on automobiles. As the Court previously observed, partsmen "obtain the vehicle parts needed to perform repair and maintenance and provide those parts to the mechanics." *Encino I*, 136 S. Ct. at 2122 (citing 29 C.F.R. §779.372(c)(2)). Mechanics, by contrast, are the ones who "perform the actual repair and maintenance work," *id.* (citing 29 C.F.R. §779.372(c)(3)), as

Respondents acknowledge, *see* Resp.Br.21 ("it is the mechanic ... who repairs automobiles").

Accordingly, the fundamental problem with Respondents' effort to narrow the scope of servicing is that servicing cannot be interpreted so narrowly as to require personal, actual, or manual maintenance or repair work without excluding partsmen. And the one thing no one can dispute is that Congress intended to exempt partsmen.

Respondents try to obscure this fundamental problem by deferring their discussion of partsmen until page 41, long after their principal argument for a narrow construction of servicing. Although the problem can be deferred, it cannot be avoided. Once Respondents get around to addressing partsmen, they end up broadening the definition of servicing sufficiently that it would fairly capture service advisors as well. At best, Respondents provide a scattershot listing of potential characteristics that *might* distinguish *some* partsmen from *some* service advisors. For example, they argue that "some" partsmen "may" have "grease under their fingernails," "work with their hands," wear no tie to work, or "work in the back" of a dealership. Resp.Br.41, 44. There are multiple problems with this submission.

First, not one of Respondents' proffered tests has any grounding in the statute. Nothing in §213(b)(10)(A)'s text suggests that Congress cared about the amount of grease under anyone's fingernails or their fashion sense or whether they "work in the back" or front of the dealership.

Second, Respondents' efforts contradict DOL regulations, which define a partsman as an employee

"primarily engaged in requisitioning, stocking, and dispensing parts." 29 C.F.R. §779.372(c)(2). Even if "some" partsmen occasionally get grease under their nails or "test, repair, and customize parts," Resp.Br.42-43, those activities are neither the defining features of partsmen nor what they are *primarily engaged in*. Respondents' only answer is to complain that Petitioner is relying on "the very DOL regulation that it persuaded this Court to invalidate as inadequately reasoned." Resp.Br.43-44. Not so. Petitioner never questioned *the "partsman" definition*—which has been on the books without change or controversy since 1970—and this Court did not invalidate it in *Encino I*. Rather, Petitioner affirmatively embraced the regulatory definition of partsmen in *Encino I*, *see* Reply Br. for Pet'r (No. 15-415) at 14 n.3, 15, to attack the unduly narrow regulatory definition of salesman, and this Court invalidated only the latter, while citing the DOL "partsman" definition with approval, *see* 136 S. Ct. at 2122-23 (citing 29 C.F.R. §779.372(c)(2)).

Third, if partsmen were sufficiently engaged in "test[ing], repair[ing], and customiz[ing] parts," Resp.Br.42, to come within the scope of the exemption, there is no reason why a service advisor's responsibilities would not equally satisfy the statute. Both the partsman and the service advisor are unquestionably *engaged in* the servicing of automobiles even though neither is "manually" or "personally" performing "maintenance or repair" on customer vehicles.

Undeterred, Respondents cite a single NLRB decision to claim that partsmen "perform automotive

manual labor" because they "hand parts directly to mechanics over a counter or in the service bay." Resp.Br.43. But unlike in a relay race, there is nothing critical here about handing things directly to a mechanic. Whether service advisors manually pass a service form or physically hand over the automobile (rather than leave those ministerial tasks to others), they perform tasks far more integral to servicing than merely handing over a part like a baton. Service advisors work closely with mechanics throughout the service process, from the initial maintenance or repair evaluations, to determinations based on customer input about what maintenance or repair the mechanic will perform, to handling customer questions about the mechanics' work. *See Encino I*, 136 S. Ct. at 2121-22; NADA.Br.7. None of that is to denigrate the important role partsmen play in servicing; but it is to say that service advisors are at least as engaged in servicing within the meaning of the statute as partsmen, even though neither routinely works on customer vehicles themselves.[5]

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[5] Respondents' remaining grab bag of textual observations, *see* Resp.Br.22-30, depends on their narrow and atextual definition of "servicing." For example, Respondents contend that "[s]elling services is not the same as servicing," because "[t]here is a fundamental difference between selling someone else's service and performing the service oneself." Resp.Br.9, 21. But emphasizing that the servicing is performed by others is just a backdoor way of saying that service advisors do not perform the service personally. Likewise, Respondents make observations about the scope of "primarily" and "engaged in." Resp.Br.24-28. But the former simply requires workers to spend the majority of their time on exempt activities, so someone who "primarily" does clerical work but spends one afternoon a week as a partsman is not exempt. "Engaged in" is a phrase that, like "any," betokens

### C. Respondents' "Distributive Phrasing" Argument Lacks Merit.

1. The Ninth Circuit repeatedly conceded that under a "literal" reading of the statutory text, §213(b)(10)(A) encompasses service advisors. *See* Pet.Br.18-20, 35-38. Respondents nonetheless ask this Court to depart from §213(b)(10)(A)'s literal, disjunctive terms ("selling *or* servicing") on the ground that "salesman" pairs only with "selling," not "servicing." Resp.Br.31; *see* Resp.Br.31-39. That is, Respondents assert that salesman goes only with selling, while partsman and mechanic go only with servicing. Resp.Br.10.

In implicit recognition that or means or and thus the statute's literal, disjunctive language covers salesmen primarily engaged in servicing, Respondents dust off the canon of "*reddendo singula singulis*," which translates to "referring each to each." Respondents summarize the canon (in terms that underscore its tepid nature) as "[f]irst often goes with first, as last often goes with last." Resp.Br.35. And they present a laundry list of other statutes purportedly illustrating the canon. Resp.Br.21-24; Resp.App.B1-B39.

But the statutes for which the *reddendo* canon applies with any force share a critical feature, implicit

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breadth. Respondents focus on the word "deem" in 29 U.S.C. §203(j), but there is no denying that Congress viewed "engaged in production" as broader than "produced," as it defined the former to include the latter *and other related activities*. Respondents can assert a narrow definition for "engaged in servicing" only by virtue of their artificially narrow definition of servicing.

in the canon's very name, that §213(b)(10)(A) lacks: they all have the *same number* of nouns and verbs, such that *each* noun has a corresponding verb with which to pair. Even when a statute has the same number of nouns and verbs, the *reddendo* canon is far from absolute, and context determines whether the disjunctive nouns couple with multiple disjunctive gerunds or just one. Pet.Br.43-44 (instruction to feed "hungry or barking cats or dogs" would not leave a famished but mute pup unfed). Section 213(b)(10)(A), however, contains three nouns and just two gerunds, thus defeating the precondition for the canon.

In fact, §213(b)(10)(A) includes not only three disjunctive nouns (salesman, partsman, or mechanic), and two disjunctive gerunds (selling or servicing), but three disjunctive objects (automobiles, trucks, or farm implements) as well. It is undisputed that all three disjunctive objects are distributed to all the viable noun-gerund combinations; no one would suggest, for example, that only farm-implement mechanics (the last with the last) and not automobile and truck mechanics are exempt. The idea is frivolous.[6] That

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[6] It is equally frivolous to draw any inference from the unique work patterns of farm-implement partsmen because partsmen were supposedly added to §213(b)(10)(A) "to accommodate the[] concerns of farm-implement dealers." Resp.Br.44-45. While an early proposal would have exempted only "partsmen primarily engaged in selling or servicing farm implements," H.R. 13,712, 89th Cong. §209(b) (ordered to be printed by Senate, Aug. 26, 1966), the text ultimately adopted more broadly exempts "any ... partsman ... engaged in ... selling or servicing automobiles, trucks, or farm implements." 29 U.S.C. §213(b)(10)(A). While not enacted, the earlier proposal's pairing of partsmen with "selling *or* servicing" does undermine the notion that Congress intended partsman (and mechanic) to go exclusively with

Respondents nonetheless invoke *reddendo* as to the noun-gerund combinations, but not the objects, underscores the oddity of their argument. They contend that *reddendo* governs half the subsection, with normal plain-language, "or-means-or" principles governing the other half. The far more sensible course (and the one far more likely to capture Congress' actual intent) is to follow the plain text for the entire subsection and honor any combinations of disjunctive nouns, verbs, and objects that exist in the real world.

Respondents' 53 examples of disjunctive statutes containing different numbers of nouns and verbs reaffirm the wisdom of following the plain text. Take, for example, 43 U.S.C. §952, which permits "[a]ny person, livestock company, or transportation corporation engaged in breeding, grazing, driving, or transporting livestock" to construct reservoirs. Respondents single out this provision as a shining example of *reddendo* because "the third subject, 'transportation corporation,' pairs only with the third and fourth gerunds, 'driving' and 'transporting,' not 'breeding' or 'grazing.'" Resp.Br.36. But this provision well illustrates *reddendo*'s limitations, especially where there are unequal numbers of nouns and gerunds. The third subject, "transportation company," is not the *only* subject that pairs with the third and fourth gerunds; the first two subjects, "person" and "livestock company," do so as well. That flatly violates the *reddendo* canon, under which the first two subjects

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servicing, which is the indispensable premise of Respondents' *reddendo* argument.

should pair only with the first two gerunds, not with all four.

Indeed, Respondents' hand-picked example ends up defeating their own argument about §213(b)(10)(A). Respondents invoke *reddendo* to argue that the fact that the second and third nouns (partsman and mechanic) sensibly pair only with the second gerund (servicing) implies that the first noun (salesman) pairs *only* with the first gerund (selling). But Respondents' own example contradicts that pattern. Even though the last noun (transportation company) sensibly pairs only with the last two gerunds (driving and transporting), the first two nouns pair with all four gerunds. That is the functional equivalent of salesman pairing with both selling and servicing, which, of course, is *Petitioner's* argument.

This is not an isolated example. Respondents implicitly concede that the default grammatical rule, and not *reddendo*, applies in nearly all of the 53 statutes they identify. Respondents highlight (quite literally) this concession in their Appendix B by using different notations (*e.g.*, underlining and bolding) to illustrate when particular nouns pair with particular verbs (*e.g.*, underlining both the noun and verb when they pair). Thus, the telltale sign in Appendix B that a statute conforms to the default grammatical rule, and not *reddendo*, is when a word is modified in two (or more) ways (*e.g.*, underlined *and* italicized). In those instances, nouns pair with more than one verb (or vice versa), so that each sensible noun-verb combination is given effect. *See* Resp.App.B3-B19.

2. Respondents invoke *United States v. Simms*, 5 U.S. (1 Cranch) 252 (1803), as an example of this Court's use of *reddendo*. *See* Resp.Br.34-36. It is no accident that Respondents must reach back that far to find an example, as the canon has largely lapsed into desuetude. It last appeared in a Supreme Court decision in a 1918 *dissent*, *Sandberg v. McDonald*, 248 U.S. 185, 204 (1918) (McKenna, J., dissenting), and was last mentioned in a majority opinion in 1896, *Atl. & Pac. R.R. v. Laird*, 164 U.S. 393, 400 (1896).

*Simms* invoked *reddendo* only in passing (in the opinion's penultimate sentence) and is in all events readily distinguishable. The statute there provided that in the newly-formed, ten-miles-square District, "penalties ... accruing *under the laws of ... Maryland and Virginia*, ... shall be recovered ..., *by indictment or information* ..., or *by action of debt*." *Simms*, 5 U.S. at 254 (emphases added). The United States brought an indictment in Alexandria even though Virginia law did not authorize indictments, but only an "action of debt." *Id.* at 255. This Court upheld dismissal of the indictment, understandably concluding that Congress did not intend to create a novel remedy under Virginia law, especially given related statutes requiring the preservation of Virginia law in the portion of the District ceded by Virginia. *Id.* at 257-59.

*Simms* illustrates what happens when a particular combination of words in disjunctive series produces a null set. In that situation, the basic or-means-or rule does not require the *creation* of something new. But where the combinations do exist, there is no basis to ignore them or the statute's literal language. If Virginia law *had* permitted recovery by

indictment, or Maryland *had* permitted recovery by indictment, information, and action for debt, all the extant actions could have proceeded.

The same principle holds true for §213(b)(10)(A). Mechanics and partsmen selling automobiles are not extruded from the exemption because of some dusty canon or obscure grammatical rule. They are not covered simply because they do not exist. They are the equivalent of a Virginia indictment or a barking cat. The problem for Respondents is that while there are no mechanics or partsmen selling automobiles, there are *100,000* salesmen primarily engaged in servicing automobiles—service advisors.

Respondents repeatedly insist that *reddendo* depends not on null sets or extant combinations, but on context. *See, e.g.*, Resp.Br.37. But the relevant "context" here is these 100,000 flesh-and-blood examples of "salesmen" primarily engaged in "servicing automobiles." There is nothing in the *reddendo* canon, especially in the lukewarm, context-specific form advocated by Respondents, that justifies treating 100,000 service advisors who come within the literal terms of the §213(b)(10)(A) exemption as non-exempt.[7]

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[7] Respondents posit (at 38) that a track meet promising a prize to "any runner, long jumper, or high jumper for excelling in running or jumping" would not award a medal to a mediocre high jumper with a particularly fast approach. But that is because success in the high jump is judged by the height of the jump. If the same track meet refused to award medals for its hurdling events on a *reddendo* theory—*i.e.*, no medals for runners who excelled at jumping—they would have a riot on their hands. Once again, the lesson that emerges even from Respondents' own examples is that *reddendo* does not justify ignoring significant

3. Respondents invoke multiple grammar guides, but none supports their strained interpretation. Resp.Br.33. For example, Respondents claim that Scalia & Garner "approv[e] of" *reddendo*, but that is a stretch; they simply acknowledge it, and only for (1) sentences that include equal numbers of words in the first and second lists; and (2) sentences that include a word signaling each-to-each phrasing ("each," "every," etc.)—neither of which describes §213(b)(10)(A). Antonin Scalia & Bryan Garner, *Reading Law* 214-16 (2012). The Singer treatise notes that "[c]ourts typically apply *reddendo singula singulis* when a section's opening words are general and the succeeding parts are specific," which likewise fails to describe §213(b)(10)(A). 2A Norman Singer et al., *Sutherland Statutes and Statutory Construction* §47:26 (7th ed. Supp. Nov. 2016). And Black's Law Dictionary underscores the canon's obsolescence, noting that it "*was* used as a rule of construction." Black's Law Dictionary 1467 (10th ed. 2014) (emphasis added).

Respondents also invoke Google Books, claiming that a search for "salesman servicing" revealed precious few results. Resp.Br.31-32. Even if Google Books were a sound interpretive guide, this particular search is unavailing. Service advisors are salesmen primarily engaged in servicing automobiles because they sell the servicing of automobiles. Nothing in Google Books or any other source suggests that there is anything anomalous about salespeople selling

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numbers of a pairing literally covered by the text's disjunctive phrasing, whether hundreds of running-and-jumping hurdlers or 100,000 selling-and-servicing service advisors.

services rather than goods (like automobiles). In fact, a Google Books search for "sell services" yielded 23,200 results, and a search for "'sell services' 'service advisor'" did not return a null set, but, *inter alia*, the explanation that "[t]he Service Advisor is responsible for ... selling the technicians' time." Roger Weissman, *Becoming an Automotive Service Advisor* 17 (2010). Finally, as with Respondents' other arguments, their Google-search argument fails to account for the statute's undoubted coverage of partsmen. The Google Books database search for "partsman servicing" contains exactly one (irrelevant) hit, but that hardly suggests that partsmen are non-exempt.

### D. Legislative History Does Not Aid Respondents.

After deeming it "inconclusive" the first time around, Pet.App.70, the Ninth Circuit took another look and concluded that the legislative history "strongly suggests" that §213(b)(10)(A) does not encompass service advisors. Pet.App.21 n.14. That change well illustrates that the search for "friends in the crowd" of legislative history depends on how hard and how far afield one looks. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). Tellingly, Respondents do not mention, much less defend, a good portion of the Ninth Circuit's "history," including statements by non-legislators and from hearings that yielded no legislation. *See* Pet.Br.47-48. What little legislative history Respondents do embrace is unrevealing, and certainly insufficient to override the unambiguous statutory text.

The only legislative history that Respondents invoke from the 1966 enactment of the relevant

language comprises a handful of floor statements noting that salesmen, partsmen, and mechanics "often had to work unpredictable hours," and "sometimes work off-site." Resp.Br.46-47. None of those statements focused on service advisors. Instead, they came during a Senate debate about whether to exempt partsmen in addition to salesmen and mechanics. And even as to partsmen, the legislative history is inconsequential. Respondents cannot plausibly contend that the exemption reaches only the subset of partsmen who work irregular hours or travel offsite.[8]

As for the 1974 amendments, Respondents merely invoke the same two-sentence "summary" the Ninth Circuit cited, without responding to its limitations. *See* Pet.Br.47. "The 1974 FLSA amendments had no effect on the text pertinent to car dealerships," which was enacted in 1966. Pet.App.6. That explains why the DOL regulations date to 1970 and why Respondents' *amici* dismiss the 1974 Amendments as "not germane." NELA.Br.11 n.3. The 1974 amendments instead narrowed the exemption for trailer, boat, and aircraft dealerships (not automobile dealerships) to "any salesman primarily engaged in selling" those vehicles. Pub. L. No. 93-259, §14, 88 Stat. 55, 65 (1974). Respondents speculate that by removing the words "partsman" and "mechanic" and

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[8] Earlier versions of the legislation would have exempted "any salesman or mechanic employed by" an automobile dealership and thus unquestionably would have exempted service advisors. *E.g.*, H.R. 13,712 at 14-15, 89th Cong., §209 (as introduced in House, Mar. 16, 1965). Although the legislative history, unlike the statutory text, is opaque, there is no indication that in adding "partsmen" to the exemption, Congress had any intent to oust service advisors.

the phrase "or servicing" for trailer, boat, and aircraft dealerships *in 1974*, Congress underscored its intent to pair "salesman" only with "selling" in the *1966 automobile dealership exemption*. Resp.Br.39-40. That theory "sounds absurd, because it is." *Sekhar v. United States*, 133 S. Ct. 2720, 2727 (2013). Even if the 1974 amendment were somehow relevant, it reflects only a congressional intent to treat all three members of the servicing triad the same and make all three non-exempt at trailer, boat, and aircraft dealerships. That Congress made no comparable changes to §213(b)(10)(A) strongly indicates that at automobile dealerships, all three remain exempt.

### E. Respondents Do Not Meaningfully Defend the Anti-Employer Canon.

Respondents (and their *amici*) invoke the so-called "FLSA canon," which purportedly calls for the statute's exemptions to be construed "narrowly." Resp.Br.16 (quoting *Mitchell v. Ky. Fin. Co.*, 359 U.S. 290, 295 (1959)); *see* NELA.Br.15-27. But they do not respond to any of the methodological problems with that "rule." *See* Pet.Br.49-50; Chamber.Br.5-15. Indeed, by claiming that the "FLSA canon" applies only to "exemptions to the FLSA," Resp.Br.16-17, they simply underscore the canon's incoherence. *See* Pet.Br.50 n.15. When it enacted interrelated operative provisions, definitions, and exemptions, Congress presumably intended all of them to be interpreted fairly and correctly, rather than having some interpreted according to the ordinary rules and others artificially narrowed.

Respondents suggest otherwise based on the notion that such canons held greater sway back in

1966 and 1974. Resp.Br.16-17; *see also* NELA.Br.26-27. But that is not how statutory interpretation works. This Court does not maintain and apply interpretive almanacs indicating which statutory interpretation principles were *au courant* during each congressional session. Instead, this Court adopts coherent and consistent principles for interpreting the United States Code, and if it rejects an interpretive method as inconsistent with those fundamental principles, it rejects the invitation to give the discarded method "one last drink." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001); *see id.* at 282-92.

The so-called FLSA canon has distorted lower court decision-making for decades. *See* NELA.Br.22 n.6. Lower courts view themselves as "bound" to apply it unless and until this Court tells them otherwise. Pet.App.20-21. The time has come to inter it once and for all and reaffirm that FLSA exemptions, like all statutory language, should be interpreted neither narrowly nor broadly, but fairly and correctly in accord with their plain meaning. Pet.Br.48-50; Chamber.Br.5-15.

## II. Respondents Disregard Forty Years Of Reliance Interests.

In *Encino I*, this Court acknowledged the "decades of industry reliance" on DOL's longstanding acquiescence in an unbroken series of cases holding service advisors exempt. 136 S. Ct. at 2126. Noting the "serious reliance interests at stake," the Court observed that "[d]ealerships and service advisors negotiated and structured their compensation plans against this background understanding." *Id.* at 2126-27. The Ninth Circuit's anomalous decision—the first

to hold that service advisors are *not* exempt under §213(b)(10)(A)—quite obviously implicates those same "serious reliance interests" and this Court's repeated concern with imposing massive retroactive liability on long-settled industry practices, *e.g.*, *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012). *See* Pet.Br.51-53.

Without even attempting to grapple with the Court's language from *Encino I* or its precedents disfavoring exactly this sort of claim, Respondents suggest that discarding over forty years of precedent and practice "will not unsettle expectations or disrupt the dealership industry," because dealerships can invoke 29 U.S.C. §207(*i*) and 29 U.S.C. §259. Resp.Br.48. Respondents' contention lacks merit.

First and foremost, Respondents made the same argument in *Encino I*, and this Court still recognized that dealerships had "serious reliance interests" and could "face substantial" FLSA liability "*even if* this risk of liability may be diminished in some cases by the existence of a separate FLSA exemption for certain employees paid on a commission basis, see §207(*i*), and *even if* a dealership could defend against retroactive liability by showing it relied in good faith on the prior agency position, see §259(a)." 136 S. Ct. at 2126 (emphases added). Respondents ignore this language, preferring instead a concurring footnote suggesting DOL might be able to overcome reliance concerns in a new rulemaking. Resp.Br.49 (citing 136 S. Ct. at 2128 n.2 (Ginsburg, J., concurring)).

The majority opinion was correct—neither §207(*i*) nor §259(a) is an adequate substitute for §213(b)(10)(A). While §213(b)(10)(A) applies to *all*

salesmen primarily engaged in servicing (*i.e.*, all service advisors), §207(*i*) applies *only* to workers (a) employed in "a retail or service establishment"; (b) earning a "regular rate of pay ... in excess of [150%] the minimum hourly rate" prescribed by the FLSA's minimum wage provision; and (c) receiving "more than half [their] compensation" from commissions. 29 U.S.C. §207(*i*). Given those requirements, §207(*i*)'s exemption "will be unavailable to a significant portion of the nation's dealerships," including those providing service advisors "more generous base compensation" or deriving over 25% of revenue from non-retail sales. NADA.Br.14-15.

As for §259(a), that provision would require a dealership to "plead[] and prove[]" the "defense" that it relied "in good faith" on a DOL "regulation, order, ruling, approval, or interpretation" exempting service advisors. 29 U.S.C. §259(a). Because §259(a) is an affirmative defense, dealerships could not obtain dismissal on a motion to dismiss (unlike under §213(b)(10)(A)), subjecting them to burdensome discovery. Furthermore, the affirmative defense would be complicated by the fact that, especially in the wake of DOL's 2011 flip-flop-flip, dealerships have been relying on decades of judicial precedents, but not an extant DOL regulation.[9]

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[9] DOL recently underscored the current lack of definitive regulatory guidance concerning service advisors by announcing it would suspend any enforcement actions while awaiting this Court's decision. *See* DOL Wage and Hour Division, Field Assistance Bulletin No. 2018-1 (Jan. 5, 2018), http://bit.ly/2EeTHkI.

And nothing in §259(a) would obviate the need to restructure employment relationships going forward in ways that may leave both employer and employee worse off. For example, an employee who prefers to receive the majority of her compensation in salary and an employer who wants to treat service advisors comparably to partsmen and mechanics for overtime would be at loggerheads, because the §207(*i*) exemption requires workers to receive over half their compensation in commissions and the §259(a) defense provides no relief prospectively.

Respondents concede that service advisors by necessity work longer hours than mechanics and partsmen because they are integral to both the intake and re-delivery process. *See* Resp.Br.47. Yet Respondents would make non-exempt the member of the servicing triad for whom an exemption is most appropriate. And they would simultaneously give the best-paid member of the triad an unjustified windfall. *See* Pet.Br.54 (explaining that service advisors are already better compensated than partsmen and mechanics). Such a result not only upsets settled expectations but introduces divisive and unjustified distinctions among employees working side-by-side.

Finally, Respondents implausibly contend that confirming four decades of precedent and practice treating service advisors as exempt would "greatly disrupt" the industry. Resp.Br.49-50. This argument beggars belief. For over *forty years*, it has been the universal view of every court to consider the question that service advisors are exempt—even in the context of DOL enforcement actions where the agency would have enjoyed some deference. As this Court

recognized in *Encino I*, that is the legal backdrop against which dealerships have operated for decades. Dealers have had no difficulty classifying salespeople who sell neither automobiles nor servicing (*e.g.*, warranty salespeople), or employees engaged in servicing who are not salesmen, partsmen, or mechanics (*e.g.*, car porters). Reversing the Ninth Circuit would do nothing more than preserve the longstanding *status quo*. By contrast, affirming the Ninth Circuit would effect a sea change in the law, put thousands of dealerships across the country at risk for retroactive damages, upend employee compensation pay packages, and needlessly divide servicing employees. Pet.Br.34, 53-54; NADA.Br.15-17.

## CONCLUSION

The Court should reverse the judgment of the Ninth Circuit.

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